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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Supreme Court No. .....

Court of Appeals No. 20484

BARBER LOFTY,
Petitioner,

vs.

ELLIOTT RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, by his attorneys Kelman, Loria, Downing & Schneider prays that a Writ of Certiorari issue to re-

view the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in this matter on March 4, 1971.

1. OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit decided and filed on March 4, 1971 and judgment in accordance with that opinion hereinafter (set forth appendix A) is not yet officially reported.

2. JURISDICTION

The jurisdiction of this court is invoked under Tile 28 U.S.C. §1254(1).

3. QUESTION PRESENTED

Does Section 224 of the Social Security Act as amended in 1965, 42 U.S.C. §424a deny Fifth Amendment Due Process of Law by unreasonably singling out workmen's compensation as the only offset against social security disability benefits?

4. STATUTES, CONSTITUTIONAL PROVISIONS, AND REGULATIONS INVOLVED

Section 424, Title 42 U.S.C. (set forth appendix B).

5. STATEMENT OF THE CASE

On March 29, 1966 petitioner filed an application for social security disability benefits, asserting inability to engage in "substantial gainful activity" from and after January 19, 1966. The application was allowed and a period of disability was established, effective January 19, 1966. Petitioner and his auxiliary beneficiaries, his wife and five children, became entitled to benefits totalling $269.80 per month, commencing August, 1966. However, those benefits were reduced to $25.80 per month on the ground that havng received a net lump-sum redemption settlement of his workmen's compensation claim under Michigan Law, Section 224 of the Social Security Act, as amended in 1965 (42 U.S.C. §424a), required such reduction.

Petitioner protested the reduction and was granted a hearing before a Social Security Hearing Examiner. The Examiner rendered a decision sustaining the Administration determination and crediting of benefits. On January 18, 1968, the Social Security Administration Appeals Council refused review of the Hearing Examiner's decision.

Petitioner then filed a civil suit in the United States District Court for the Eastern District of Michigan, Southern Division, pursuant to the judicial review provisions of 42 U.S.C. §405(g) contending that section 224 of the Social Security Act as amended in 1965 denied Fifth Amendment Due Process of Law by unreasonably singling out workmen's compensation as the only offset against social security disability benefits. Defendant-respondent interposed a motion for summary judgment which was granted by the United States District Judge by order entered on March 25, 1970.

Pursuant to statutes made and provided, petitioner filed an appeal to the United States Court of Appeals for the Sixth Circuit and said Court rendered an opinion dated March 4, 1971 upholding the constitutionality of Section 224a (appendix A).

6. REASON FOR GRANTING WRIT OF CERTIORARI

An important federal question is presented in this case in that petitioner asserts that the taking or reduction of social security disability benefits to which he and his dependents have been entitled under 42 U.S.C. §424a deprives petitioner and his dependents of property without due process of law as protected by the Fifth Amendment of the Constitution of the United States, in that said provisions so discriminate against petitioner and other persons in similar situations, as to be violative of due process.

In addition, the instant case is an appropriate one for review under Supreme Court Rule 19 (b) because there exists a conflict in the decisions of our Federal Courts on this question.

On September 10, 1970 the United States District Court for the Southern District of West Virginia handed down its decision in the case of *Raymond Belcher v. Richardson*, 317 F. Supp. 1264 (S.D.W. Va. 1970) in which the court held:

> "In sum, therefore, it is held that in the circumstances of plaintiff's case, the application of Section 224 cannot be constitutionally applied, since to do so would deprive him of due process and equal protection of the law under the Fifth and Fourteenth Amendments."

In reaching the above cited conclusion, the United States District Court for the Southern District of West Virginia made the following pertinent findings:

> "It cannot be seriously contended that the Social Security Act itself is unconstitutional for its constitutionality has been upheld in a long line of cases. *Helvering v. Davis,* 301 U.S. 619 (1937) • • • It is equally well settled that entitlement to social security benefits is subject to all conditions set out in the Social Security Act under which benefits are to be paid. *Flemming v. Nestor,* 363 U.S. 603 (1960).
>
> "We have been referred to several unreported decisions of district courts and one reported decision, *Bartley v. Finch,* 311 F. Supp. 876 (E.D. Ky. 1970), in support of the defendant's position that Section 224 may be constitutionally applied, and it would indeed be easy for us to follow that path. However, we are not convinced that the issue raised in this case deserves such cavalier treatment especially in view of the more recent decision of the Supreme Court in *Goldberg v. Kelly,* 397 U.S. 254 (1970), which tends to elevate entitlement to welfare to the status of a property right and to surround it with all the safeguards required by due process.
>
> "Therefore, since the Court in Goldberg appears to have determined that entitlement to welfare is in the nature of a property right, protected by the Due Process Clause of the Fifth Amendment, by the same rationale it must be determined that one who has made direct contribution to the social security fund and becomes entitled to disability benefits thereunder should and ought to be accorded equal status and protection. For it seems to us to be patently unfair for the welfare recipient, under Goldberg, to have a 'property right status' with all the procedural safeguards of due process, while the social security recipient, under Nestor, is deprived of such status and protection.

"Thus, we must conclude that the concept espoused by the majority in Nestor, that one who has contributed to the social security fund and later becomes eligible to receive the benefits, provided by the Social Security Act has no indefeasible property right to such benefits, is no longer to be considered a viable and controlling precedent for that principle, in view of the more recent holding in Goldberg that a welfare recipient who has made no direct contribution to the fund from which he draws benefits does have a recognizable property right to such benefits and one which is protected by all the safeguards of due process.

"The defendant, in justification of these discriminatory features of the offset provision, argues that its purpose was to avoid duplication of public benefits. If this be its true purpose, it is certainly a laudable one and one with which this Court could wholeheartedly accept. However, the argument is inapplicable here for, as previously shown, workmen's compensation in West Virginia is not a gift from the public largesse, but rather is an entitlement arising from a contractual relationship between employer and employee, sanctioned by law, whereby each gave up a legal right in return for a concomitant legal benefit."

"That no public funds are involved is made abundantly clear by the provisions of West Virginia Code 23-3-1. There, it is provided that the Workmen's Compensation Fund shall be supported by 'premiums and other funds paid thereto by employers,' from which shall be paid all benefits due the employees or their dependents and the expenses of administering the law. No public funds being thus involved, the defendant's argument that plaintiff's workmen's compensation award should be treated as a public benefit obviously becomes quite untenable and must be rejected."

As indicated above, the District Court of West Virginia refused to follow the decision of the three-judge panel in

Barthey v. Finch, 311 F. Supp. 876 Eastern District of Ky (1970) which upheld the constitutionality of Section 224.

It is petitioner's understanding that the United States Supreme Court has agreed to review the decision in the *Belcher* case and that the *Bartley* decision has also been appealed to the United States Supreme Court. In order that petitioner's rights be fully protected, it is petitioner's request that certiorari be granted by the Supreme Court to hear this matter so that this case can be disposed along with the other cases pending before this Court (referred to above) which likewise are based upon the question of the constitutionality of Section 224a.

The Question is Substantial

The Fifth Amendment to the Constitution of the United States of America provides in pertinent part that:

> "No person shall * * * be deprived of life, liberty or property, without due process of law * * * "

Neither Section 224 nor any other benefit provision of the Social Security Act is beyond the reach of Fifth Amendment due process. The fact that Congress need never have enacted a system of social security, the fact that benefits granted under such a system of Social Security, might be labeled a "privilege" and not a "vested right," in no way removes the system from the requirements of fairness and rationality expressed in the Due Process Clause, and in no sense insulates the statute from judicial review for constitutionality. As stated in *Flemming v. Nestor,* 363 U.S. 603, 611 (1960): "The interest of a covered employee under the [Social Security] Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." Accord: *Sherbert v.*

Verner, 374 U.S. 398, 404 (1963) (unemployment benefits); *Shapiro v. Thompson,* 394 U.S. 618, 89 S. Ct. 1332, 1327 n. 6 (1969) (welfare benefits).

Secton 224, providing as it does for the reduction of social security disability benefits where the claimant happens to be receiving workmen's compensation, is constitutionally defective even under the narrowest conception of due process. That is so not because an offset scheme is intrinsically impermissible but because the isolation of workmen's compensation and only workmen's compensation for the purpose of curtailing social security disability benefits is thoroughly arbitrary and grossly discriminatory.

It is well accepted that the Fifth Amendment incorporates the fundamentals of equal protection of law. *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954); *Schneider v. Rusk,* 377 U.S. 163, 168, (1964) ("While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due *process.'"). Flemming v. Nestor), supra,* states the test of permissible classification in these terms:

> "[W]e must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification."[1]

---

[1] The quoted passage is preceded by this qualifier clause: "Particularly when we deal with a withholding of a non-contractual benefit under a social welfare program such as this . . ." That language can be misleading because it suggests that the Court's standards of constitutionality are somehow less severe in relation to a "social welfare program." That is not the case, as is seen in *Sherbert v. Vernor* and *Shapiro v. Thompson, supra.* Moreover the Supreme Court has used practically identical language as that quoted above from *Nestor* to describe the standards of equal protection as applied to non-welfare legislation. See *Williamson v. Lee Optical Co.,* 348 U.S. 483, 489 (1955); cf. *Morey v. Doud,* 354 U.S. 457 (1957).

While *Flemming v. Nestor* obviously imposes a heavy burden on parties assailing constitutionality, a careful analysis of the benefit-reduction provisions of Section 224 does disclose "a patently arbitrary classification, utterly lacking in rational justification." A statutory classification is "patently arbitrary" and "utterly lacking in rational justification" if it does not subserve a permissible legislative objective. Moreover, the classification must be a rational means to a lawful end, and if it is not that, then it is discrimination for the sake of discrimination, thus invidious and thus unconstitutional.

In the court below, the Government suggested two not entirely distinguishable Congressional objectives in reducing social security benefits when the claimant is receiving workmen's compensation. (1) To prevent the payment of excessive combined benefits, (2) to avoid duplication of public benefits.

Payment of Excessive Combined Benefits

The Government's first contention is that Congress devised the offset formula in order to preclude a disability claimant from receiving amounts in excess of his earnings while working, and thus "profiting" from his misfortune. We do not deny that such a purpose is constitutionally open to Congress. This is by no means to say that the legislative wisdom of such a policy is unimpeachable. The benefit-reduction provision has had an in-again, out-again history. It was added in 1957 and abandoned in 1969. See *Knapczyk v. Ribicoff*, 201 F. Supp. 283 (N.D. Ill. 1962). It returned in 1965, Pub. L. 89-97, Title III, §335, 79 Stat. 406. As the court below indicated, a similar Congressional purpose seems to animate Section 203 (b) of the Act (42 U.S.C. §403(b)), which calls for reducing old-age benefits by reason of excess earnings.

The gravamen of our complaint is that Section 224 quite arbitrarily singles out workmen's compensation from a broad universe of other forms of benefits payable for injury or disability. Thus a concern about excessive combined benefits does not explain why a social security disability claimant who has received a tort damage award or settlement for the same injury giving rise to his disability will still receive full social security benefits. Or why social security benefits will not be reduced where the claimant is receiving the proceeds of a disability insurance policy which he or his employer has purchased. Nor is concern about "excessive combined benefits" compatible with the exemption contained in Section 244 for persons 62 or older. For them, the Act does not require any reduction in social security benefits because of workmen's compensation. Separate provision is made in Section 202(q), 42 U.S.C. §402 (q), for reduction of disability benefits because the claimant is receiving old-age benefits. However, this still leaves a 62 year old claimant in a preferred position with respect to his combined social security and workmen's compensation benefits. If, as the Government maintains, it is reasonable to preclude a claimant from receiving benefits greater than earnings while working, on what conceivable basis it is rational to do so only in the case of a workmen's compensation recipient who is under age 62, but not in the cases of older claimants, or claimants with tort recoveries (often far larger than workmen's compensation awards or settlements), or claimants with private disability insurance? If anything, there is much less reason for discriminating against a workmen's compensation recipient than an ordinary tort victim, since the compensation recipient in the most realistic sense has paid for his compensation rights by his labor.

Moreover, a professed Congressional purpose to prevent a combination of benefits *exceeding* former earnings

does not explain why the reduction formula of Section 224 limits total benefits to a sum 20 per cent *below* average current earnings. Surely that limitation cannot be explained as an incentive-to-work or an anti-malingering device—for the obvious reason that the claimant must not only satisfy the stern test of disability set forth in Section 223 of the Act (42 U.S.C. §423), but specific provision is made in Section 225 (42 U.S.C. §425) for suspension of benefits where the Secretary believes that the claimant's disability has ceased.

The expressed fear that combined social security and workmen's compensation payments would deter rehabilitation and that this forms a "reasonable basis" for the discrimination of workmen's compensation beneficiaries under Section 224 becomes even more unrealistic and unpersuasive when one realizes the minute number of social security disability beneficiaries who are also receiving benefits under workmen's compensation plans of insurance. Robert M. Ball, Commissioner of social security has testified:

> " (A)bout 98 percent of the cases that are eligible for payments under social security law have disabilities that are not work connected. The big diagnostic categories for the social security program are chronic illnesses such as heart disease, mental disorders, cancer, stroke, and not conditions that are not ordinarily work connected. Hearings on H. R. 6675, Senate Committee on Finance, 89th Cong., 1st sess., p. 153 (1965)."

Further, then Secretary of Health, Education and Welfare, Celebrezze, and Commissioner Ball both testified that only two percent of all disability insurance cases would be covered by workmen's compensation:

> "About 2 percent of the total number of disability beneficiaries that we have now would be eligible for both workmen's compensation and social security disability benefits. Under the amendment (1965 liberalizing of the definition of disability) we believe the percentage would stay about the same. Hearings on H.R. 6675, supra at 152, 153."

In addition, statistics given by Robert M. Ball, Commissoner of social security show how few workmen's compensation beneficiaries have a disability which extends beyond the six months waiting period for which no social security disability benefits are payable (52 USCA 423 (c) (2)). In testimony on the bill that includes Section 224 (Hearings on H.R. 6675, Senate Committee on Finance, Vol. II, 89th Cong., 1st sess. (1965), pp. 907-908, 922) Commissioner Ball furnished statistics that in 1951 of 68,944 workmen's compensation awards only 842 had disabilities lasting more than 175 days. From 1955-61 there were on the average 650,000 yearly workmen's compensation awards. Of this only some 500 to 600 a year were for permanent total disability or 0.08-0.10 percent; major permanent partial disability averaged 2.5 percent yearly; minor permanent partial disability averaged 23-25 percent yearly and temporary total disability averaged 71.5-73 percent yearly. When the original offset existed, July 1957 to July 1959, only 2.7 percent of social security disability cases were offset.

Thus it can be seen, that from statistics of the Social Security Administration itself, that only approximately 2 percent of all social security disability beneficiaries are also beneficiaries under a workmen's compensation plan of insurance. And what of the 98 percent, many of whom must certainly receive other income in the form of private insurance benefits, investment income or non-workmen's

compensation personal injury awards? Are they more reliable than the 2 percent receiving workmen's compensation benefits and can it be said that they would be less deterred from rehabilitation, though their combined benefits might well exceed their average prior wage? We think not.

Duplication of Public Benefits

The second rationale advanced by the Government for Section 224 as stated in its brief to the District Court and Court of Appeals is as follows:

> "[B]enefits which are not workmen's compensation but are received as a result of a non-work connected disability are significantly different—public monies are not involved and there is no duplication of public benefits which the Congress by enactment of the statute sought to avoid."

Again assuming that it is open to Congress to preclude or limit the "duplication of public benefits," the Government argument completely misconceives and misdescribes workmen's compensation. The Government asserted below that workmen's compensation is "significantly different" from benefits received as a result of non-work connected disability because the former entails the expenditures of "public monies," as the latter does not.

This simply is not so. Workmen's compensation benefits in most states are paid either directly by the employer (as self-insurer) or by the employer's insurance carrier. See 3 Larson Workmen's Compensation Law §92.10, p. 444; 2 Schneider, Workmen's Compensation Text §2482, p. 207.

In Michigan an employer may make payment by one of four methods set forth in Comp. Laws §414.1, M. S. A. §17.195:

> "First, upon furnishing satisfactory proof or bond in a reasonable amount as may be determined by the commission, to said commission of his solvency and financial ability to pay the compensation and benefits hereinbefore provided for, to make such payments directly to his employees, as they may become entitled to receive the same under the terms and conditions of this act; or
>
> "Second, to insure against such liability in any employer's liability company authorized to take such risks in the State of Michigan; or
>
> "Third, to insure against such liability in any employer's insurance association organized under the laws of the state of Michigan; or
>
> "Fourth, to request the commissioner of insurance of the state of Michigan to assume the administration of the disbursement of the premiums and assessments necessary to pay the same * * * "

It should be noted that even the last method of payment, through the administrative instrumentality of the state accident fund, in no way involves the use of "public money." Indeed the statute, Comp. Laws §415.1, M.S.A. §17.199, specifically states that "neither the commissioner of insurance nor the state of Michigan shall become liable or responsible for the payment of claims for compensation under the provisions of this act beyond the extent of the funds so collected and received by him . . . "

According to the Larson and Schneider treatises, supra, only five states provide for a state industrial accident fund as the exclusive vehicle for payment (Nevada, North Dakota, Oregon, Washington, and Wyoming), but, again, the state fund is not composed of public monies but of premiums paid by the employers. See, e.g., Ore. Rev. Stats §656.002 et seq., Wyo. Stats. §27-63 et seq.

Thus the premise on which the Government's "duplication of public benefits" rationale depends is entirely inapplicable to workmen's compensation benefits. In fact, Section 224 of the Social Security Act would actually permit a claimant to receive funds which *are public* in the most literal sense (i.e., taxpayer-provided) without suffering diminution of his social security disability benefits in a case, for example, in which the claimant received a tort recovery from a municipality, state, or other unit of government.

To invalidate Section 224, as we urge this Court to do, would *not* deprive Congress of the power to impose a ceiling on combined benefits. It would only require Congress, should that be its policy, to act in an even-handed manner with respect to all practically and rationally indistinguishable benefit sources. Writing in *Railway Express Agency v New York,* 336 U.S. 106, 112-13 (1949) (concurring opinion), Mr. Justice Robert Jackson developed this point with his customary grace of expression:

> "Invalidation of a statute or ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.
>
> "Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equally is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government

> than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."

In its present form, Section 25a metes out adverse treatment to recipients of workmen's compensation and to them alone. Neither of the purposes the Government sought to ascribe to Congress can rationally justify this treatment. Barring the attribution of still another objective to which benefit-reduction limited to workmen's compensation is relevant and none has asserted to us—the section stands as an act of simple animosity to the recipients of workmen's compensation or a crudely apt new device for curtailing the System's benefit outflow. Neither of course is sufficient justification for due process. The discrimination, in short, is invidious in the constitutional sense. And for the court to declare a violation of Fifth Amendment due process here is not to substitute judicial for legislative wisdom, but to find that Section 25a as now written falls within the prohibited zone described by *Flemming v. Nestor*, *supra*, because it "manifests a patently arbitrary classification, utterly lacking in rational justification."

CONCLUSION

For the reasons aforementioned, petitioner does pray that a Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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APPENDIX A

No. 20484

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Barber Lofty, Plaintiff-Appellant,

v.

Elliott L. Richardson,
Secretary of Health, Educaton and Welfare,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Michigan, Southern Disrict.

Decided and Filed March 4, 1971

Before: Edwards and Miller, Circuit Judges, and O'Sullivan, Senior Circuit Judge.

Edwards, Circuit Judge. In this case appellant attacks the constitutionality of an amendment to the Social Security Act adopted in 1965 (42 U.S.C. § 424(a), *as amended,* (Supp. V, 1969)) which had the effect of reducing a claimant's Social Security disability benefits by the amount of Workmen's Compensation benefits received by him where the total received under the two programs exceeded 80% of his previous average monthly wages. Appellant claims this provision violates the due process clause of the United States Constitution because when Congress made Workmen's Compensation the only subject for such deductions, it thereby created a patently arbitrary classification.

We begin our consideration of this case, as indeed we must, with the Supreme Court's last ruling upon an invidious classification argument in a Social Security case.

> "This is not to say, however, that Congress may exercise its power to modify the statutory scheme free of all constitutional restraint. The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause. In judging the permissibility of the cut-off provisions of § 202 (n) from this standpoint, it is not within our authority to determine whether the Congressional judgment expressed in that section is sound or equitable, or whether it comports well or ill with the purposes of the Act. 'Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with widom. *Helvering v. Davis, supra,* at 644. Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as this, *we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.*" *Flemming v. Nestor,* 363 U.S. 603,611 (1960). (Emphasis added.)

Since we cannot say that the classification herein attacked was "utterly lacking in rational justification," we cannot hold as appellant asks that Congress was without power to pass the 1965 amendment.

Claimant in this case was granted total and permanent disability benefits under the Social Security Act starting

in 1966. In June of 1966 he accepted a lump sum "redemption settlement" in full payment of his Workmen's Compensation claim arising out of the same injuries which produced his total and permanent disability for Social Security benefits.

Taking into account the Workmen's Compensation settlement, the Secretary reduced claimant's Social Security benefits from $269.80 a month to $25.80 per month for 44 months, or until the Compensation settlement had been exhausted at the rate of $57 per week. This action was taken under 42 U.S.C. § 424(a), *as amended,* (Supp. V, 1969), which placed a limit of 80% of claimant's previous average monthly earnings upon the total of Social Security and Workmen's Compensation benefits which he was to receive. Section 424(a) required that only the difference, after deduction of Workmen's Compensation benefits, should be paid by Social Security.

This reduction formula was adopted by Congress in 1965, effective January 1, 1966. Much of the testimony which preceded its adoption argued that double disability benefits close to or exceeding prior earnings defeated the purpose of motivating injured beneficiaries back toward productive work and tempted the states to reduce or eliminate Workmen's Compensation benefits and throw full responsibility on the national Social Security scheme.

The amendment enacted by Congress is now attacked, not because the purposes claimed for it might not be arguably rational grounds for congressional action, but because Congress in establishing the reduction provision referred to above did not also include such benefits as private insurance proceeds and benefits resulting from damage suits in civil courts. It is claimed that existence of these benefits without deductions makes the selection of Workmen's Com-

pensation as the only deduction against Social Security benefits an arbitrary and capricious classification which cannot stand when tested against the due process clause.

The District Judge who heard this case below dismissed it with a brief opinion which cited the reasons for the amendment referred to above and held that "it is therefore reasonable to preclude a claimant from receiving amounts as a result of retirement or disability far in excess of his earnings received while working." The District Judge held that the classification involved herein was not patently arbitrary within the meaning of *Flemming v. Nester,* 363 U.S. 603 (1960).

We have already set forth above the essential holding of the *Flemming* case upon which the District Judge based decision. But there is a good deal of case law which serves to illustrate the breadth of legislative power accorded the Congress (or the states) by the Supreme Court's interpretation of the constitutional limitations contained in the due process and equal protecion clauses.

In the following two cases, former Chief Justice Warren wrote for the Court:

> "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. See *Kotch v. Board of River Port Pilot's Comm'rs,* 330 U.S. 552; *Metropolitan Casualty Ins. Co. v. Brownell,* 294 U.S. 580; *Lindsley v. National Carbonic Gas Co.,* 220 U.S. 61; *Atchison, T. & S. F. R. Co. v. Matthews,* 174 U.S.

96." *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961). (Footnotes omitted.)

"[S]ome basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. See *McGowan v. Maryland,* 366 U. S. 420 (1961); *Kotch v. Board of River Pilot Commissioners,* 330 U. S. 552 (1947); *Lindsley v. National Carbonic Gas Co.,* 220 U.S. 61 (1911). With this much discretion, a legislature traditionally has been allowed to take reform "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 489 (1955), and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, though through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. See *Ozan Lumber Co. v. Union County National Bank,* 207 U. S. 251 (1907)." *McDonald v. Board of Election Commissioners of Chicago,* 394 U. S. 802, 809, (1969).

Even more recently Justice Stewart dealt with a somewhat similar classification argument:

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imper-

> fect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan v. Maryland*, 366 U.S. 420, 426." *Dandridge v. Williams*, 397 U. S. 471, 485 (1970).

With these rule pertaining to legislative power before us,[1] we turn directly to the background and purpose of the disputed amendment.

The legislative record plainly shows that Congress had the Workmen's Compensation-Social Security overlap before it as a problem for a decade. When the Social Security Act was first passed in 1935, it provided no disability benefits. Act of Aug. 14, 1935, ch. 531 49 Stat. 620 et seq., (42 U.S.C. § 301 (ff)). When benefits for total and per-

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[1] The *McGowan*, *McDonald* and *Dandridge* cases are, of course, attacks upon state statutes, wherein appellant's reliance was upon the equal protection clause of the Fourteenth Amendment. As to an assertion of an arbitrary classification argument, there is a wide area of overlap between the effect of the Fifth Amendment's due process clause and the Fourteenth Amendment's equal protection clause. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

If there be a difference between the effect of these two clauses, it would appear that since the equal protection clause is the more "explicit" of the two clauses, the cases quoted above would apply a fortiori to this attack upon a federal statutory classification where reliance is had on due process.

manent disability were first added in 1956, Congress did require the offset of Workmen's Compensation. Act of Aug. 1, 1956, Pub. L. No. 880, 70 Stat. 816-17.

Two years later, however, acting on the assumption that the impact of the duplication was relatively slight, the offset provision was repealed. Act of Aug. 28, 1958, Pub. L. No. 85-840, Sec. 206, 72 Stat. 1025.

In the years which followed it is clear that Congress received a great number of complaints about the repeal of the offset. These complaints—the overwhelming majority of them originating with large employers or large employer organizations—let to reenactment of the Workmen's Compensation offset (in somewhat different form) in the Soc. Sec. Amendments of 1965, eff. Jan. 1, 1966, Pub. L. No. 89-97, Tit. III, § 335, 79 Stat 406. 42 U.S.C. § 424(a), *as amended,* (Supp. V, 1969).

Hearings were held before adoption of Section 424(a) only in the Senate—but the record there amply serves to indicate the rationale of its advocates. Thus L. J. Dikovics, representing the Council of State Chambers of Commerce, told the Senate subcommittee:

> Thousands of disabled workers today are receiving more tax-free income from social security disability benefits combined with State workmen's compensation benefits than they were receiving before they became ill or were injured. Section 303 would add many more thousands to this number. When tax-free social insurance benefits exceed earning power there is little risk, pain, and struggle involved in attempting to become self-supporting again.
>
> A matter of equal concern is the impact of Federal disability payments on State workmen's compensation programs. Legislative proposals have been offered

in several States (Colorado, Florida, Maryland, and Minnesota) to reduce workmen's compensation benefits by the amount of OASI disability benefits payable to a disabled worker. If other States follow this direction and section 303 of this bill is enacted, we believe it will be only a matter of time until state workmen's compensation programs are destroyed.

If that happens, a major impetus for this country's remarkable achievements in occupational safety will be destroyed also. Workmen's compensation insurance costs are based on the actual loss experience of industry groups and of individual employers. This gives the employer a direct financial incentive to improve safety on the job. If workmen's compensation costs are absorbed into the social security program, employers without safety programs and those whose employment is hazardous would pay no more than those employers who have adopted safety programs or who have less hazardous employment. We strenuously object to any action which could have an adverse effect on safety programs and on the remarkable downswing in disabling accidents that has taken place over the last three decades. Hearings on H.R. 6675 Before the Senate Comm. on Finance, 89th Cong., 1st Sess., p. 259 (1965).

And J. Dewey Dorsett, representing the American Insurance Association, presented a table purporting to show that continued duplication of benefits under terms of the then pending bill would mean at least some payments in excess of prior average "take home pay" in every state, and up to a maximum of 247% in the instance of Arizona.

Chart I.—*Duplication of workmen's compensation disability benefits by social security benefits in H.R. 6675*

State	Combined workmen's compensation and social security benefits [1]	Average weekly take-home pay [2]	Workmen's compensation maximum weekly benefit [3]	Combined benefits percentage of take-home pay
Alabama	$ 96.62	$ 67.96	$ 38.00	142
Alaska	172.00	130.10	100.00	132
Arizona	222.10	90.06	152.50	247
Arkansas	92.05	65.16	35.00	141
California	142.00	101.21	70.00	140
Colorado	111.60	86.55	43.75	129
Connecticut	127.77	88.35	59.00	145
Delaware	113.97	79.30	50.00	144
District of Columbia	137.48	86.30	70.00	159
Florida	101.26	69.05	42.00	147
Georgia	94.97	66.74	37.00	142
Hawaii	142.85	87.11	75.00	164
Idaho	110.26	81.56	45.00	135
Illinois	122.85	86.73	55.00	142
Indiana	108.97	78.94	45.00	138
Iowa	105.60	78.08	42.00	135
Kansas	107.26	81.38	42.00	132
Kentucky	102.38	73.59	41.00	139
Louisiana	98.14	77.12	35.00	127

State	Combined workmen's compensation and social security benefits [1]	Average weekly take-home pay [2]	Workmen's compensation maximum weekly benefit [3]	Combined benefits percentage of take-home pay
Maine	[illegible]	[illegible]	42.00	149
Maryland	[illegible]	[illegible]	55.00	150
Massachusetts	[illegible]	[illegible]	71.00	164
Michigan	[illegible]	[illegible]	81.00	168
Minnesota	[illegible]	[illegible]	45.00	134
Mississippi	[illegible]	[illegible]	35.00	142
Missouri	[illegible]	79.60	47.50	141
Montana	[illegible]	[illegible]	46.00	130
Nebraska	[illegible]	77.76	40.00	133
Nevada	[illegible]	[4] [illegible]	57.20	127
New Hampshire	[illegible]	70.40	45.00	149
New Jersey	[illegible]	[illegible]	45.00	132
New Mexico	[illegible]	[illegible]	40.00	123
New York	[illegible]	[illegible]	60.00	148
North Carolina	[illegible]	[illegible]	37.50	144
North Dakota	[illegible]	[4] 72.71	51.00	149
Ohio	[illegible]	[4] [illegible]	56.00	133
Oklahoma	[illegible]	76.41	37.50	131
Oregon	[illegible]	[4] [illegible]	57.69	141
Pennsylvania	[illegible]	[illegible]	47.50	135
Rhode Island	[illegible]	79.54	45.00	138

State	Combined workmen's compensation and social security benefits [1]	Average weekly take-home pay [2]	Workmen's compensation maximum weekly benefit [3]	Combined benefits percentage of take-home pay
South Carolina	90.38	63.93	35.00	141
South Dakota	101.60	78.40	38.00	130
Tennessee	96.80	68.07	38.00	142
Texas	98.14	77.06	35.00	127
Utah	122.40	90.41	52.80	135
Vermont	103.26	69.00	44.00	150
Virginia	98.26	69.52	39.00	141
Washington	122.57	[4] 89.40	57.69	137
West Virginia	100.31	[4] 82.88	38.00	121
Wisconsin	130.18	83.50	64.00	156
Wyoming	118.51	[4] 84.37	55.38	140
Longshoremen's Act	114.67	[5]	70.00	...

[1] Compensation benefits for temporary total disability payable to a worker with a wife and 2 children. Social Security benefits provided in H.R. 6675 (medicare bill), pp. 164-165.

[2] Average weekly wages less Federal income and social security taxes (4 deductions). Based upon wages of employees to whom compensation paid, July 1964—National Council on Compensation Insurance.

[3] As of May 1965. Includes maximum allowance for temporary total disability for worker with a wife and 2 children. (Michigan and New York reflect benefit increases contained in bills that have passed their legislature.)

[4] Figures not available to National Council on Compensation Insurance for monopolistic State fund. Source: Production workers in manufacturing—1960 Statistical Supplement, Monthly Labor Review, pp. 33-35 (U.S. Department of Labor).

[5] Figures not available—varies in each State.

Hearings on H.R. 6675 Before the Senate Comm. on Finance, 89th Cong., 1st Sess., p. 898 (1965).

It is clear that employer advocates of the offset amendment outweighed their opponents in numbers of spokesmen and of exhibits tendered. But an opposing point of view was presented by the Secretary of Health, Education and Welfare[2] and two of his top associates who sought to delay enactment of any change until a more thorough study had been made.

> Secretary Celebrezze. Senator, I think yesterday I explained that the Advisory Council on Social Security, which made a report recently, asked that a study be made, and the House Ways and Means Committee in their report also directed us to make a study of the extent and effects of the overlap between social security and workmen's compensation and to report by December 1966. I think I stated yesterday that perhaps 2 percent of the disability beneficiaries under social security also receive workmen's compensation, and that there were many factors that had to be considered in connection with this question. This issue has to be studied in depth.
>
> I can't give you an off-the-cuff opinion on it, but let me tell you what some of the basic problems would be.
>
> First of all, if at the time of disability the man has a low-paying job, of course, that would have a bearing upon the amount of benefits he would receive.
>
> Then, if a man is totally disabled as of a certain period, even though under a combination of work-

[2] Hon. Anthony J. Celebrezze, now a Judge of this court.

men's compensation and social security disability benefits he may receive more than his wages were, I think we have to give some consideration to the fact that had he not been disabled his wages would have been substantially higher, say, 10 or 15 years later, and to find a way of taking account of that fact.

Another element is that the Congress of the United States in 1958 repealed the offset provision that had been in effect because it presented a great many technical and administrative problems. In certain cases, the offset provision resulted in delays in paying disability benefits because of the slow process, in some instances, of determination under workmen's compensation and because we couldn't move until we knew what the amount of compensation was when the award had been made.

So there are many problems that have to be staffed out and thoroughly considered.

I think the House Ways and Means Committee in its wisdom arrived at the right conclusion—that there is a need for the Social Security Administration to make a thorough study of this question and to report back to Congress by December of 1966. Hearings on H.R. 6675 Before the Senate Comm. on Finance, 89th Cong., 1st Sess., p. 146 (1965).

However persuasive this statement might appear to us, it is clear that the Senate committee did not desire to wait. Its report on which subsequently the Senate and then the House acted favorably provided:

(b) *Reduction of disability benefits on account of receipt of workmen's compensation benefits*

The committee has taken note of the concern that has been expressed by many witnesses in the hearings about the payment of disability benefits concurrently with benefits payable under State workmen's compensation programs. While data of the kind requested by the House Committee on Ways and Means in its report on this bill are not now available, the committee believes that amendatory legislation should not await completion of the requested study. Although there is some dispute as to the number of workers who receive benefits under these two programs and whether these payments are excessive, the committee believes that it is desirable as a matter of sound principle to prevent the payment of excessive combined benefits.

The committee believes that the provision it is recommending avoids the problems and inequities of the earlier offset provision in the social security law for reducing monthly disability benefits by the amount of any other benefit to which a worker was entitled under State workmen's compensation laws, which was in effect from July 1957 to July 1958, but was repealed then. The new offset provision recommended by the committee provides for a reduction in the social security disability benefit (except where the State workmen's compensation law provides for an offset against social security disability benefits) in the event the total benefits paid under the two programs exceed 80 percent of the worker's average monthly earnings prior to the onset of the disability. Under this provision, the worker's average monthly earnings would be defined as the higher of *(a)* his average monthly wage used for purposes of computing his social security dis-

> ability benefit or (*b*) his average monthly earnings, in employment covered by social security, during his highest 5 consecutive years after 1950. (In no event, however, would the total benefits payable with respect to a worker be reduced below the amount of the unreduced monthly social security benefits.) This reduction formula would generally avoid the inequity encountered under the previous offset provision, where the reductions that were required frequently resulted in benefits that replaced no more than 30 percent or so of the worker's earnings at disablement. S. Rep No. 404, 89th Cong., 1st Sess., p. 100 (1965).

This then brings us to consideration of appellant's argument that the disputed amendment represents "a patently arbitrary classification, utterly lacking in rational justification." *Flemming v. Nestor,* 363 U.S. 603, 611 (1960), and hence must be declared void. It seems to us that the result contended for by appellant would represent a very narrow construction of the congressional power to enact, amend and modify social legislation as required by the circumstances reported to Congress concerning its operation. If (as appellant concedes) the rationale for preventing double coverage is a reasonable one (whether we might individually agree with it or not) then we believe that Congress also had the right to make it applicable to Workmen's Compensation claimants and not to do so as to recipients of damage action judgments and private insurance proceeds.

The legislative history of this amendment shows a great many complaints were registered before Congress about Workmen's Compensation Social Security double coverage. The record is devoid of any complaints at all about double coverage resulting from private insurance or negligence

actions in courts. It is neither novel nor necessarily irrational for Congress to fail to act upon a problem about which they have received no complaints and have been supplied no information, even when Congress, as here, does act upon a somewhat parallel problem as to which it had both.

Still another reason which might reasonably be conceived to justify the congressional classification is that administratively it would be relatively simple to enforce the Workmen's Compensation deductions, whereas separating out the wage benefits from civil damage judgments, or determining who had received private insurance benefits, might offer administrative problems of a serious nature.

Finally, it is entirely conceivable to us that Congress may have considered Social Security benefits and Workmen's Compensation benefits to be more arguably duplicative of one another than could appropriately be claimed concerning Social Security benefits and the other two types of payments. Both Social Security and Workmen's Compensation programs are social welfare legislation. Private accident or disability insurance is a private contract, frequently paid for entirely by the recipient. And, of course, court awards for injuries are private rights derived from the common law involving the principle of compensation for negligence or fault.

Most of the argument for the Workmen's Compensation off-set came from employers who generally pay all of the costs for Workmens' Compensation and half the costs of the Social Security benefits. Their argument before Congress was that they were paying twice for the same injury. This argument would have, of course, no merit at all in relation to a damage action award or to the proceeds of privately purchased accident or disability insurance.

As we have already indicated, our conclusion is that Section 424(a) does not violate the due process clause of the United States Constitution.

As to the other two issues presented in appellant's brief, we affirm the judgment of the District Court for the reasons set forth in the opinion of the District Judge.

The judgment of the District Court is affirmed.

APPENDIX B

42 U.S.C.A. 424a, Pub. L. 89-97, Title III, 335, 79 Stat. 406, Amended Jan 2, 1968, Pub. L. 90-248, Title I, 159(a), 81 Stat. 869

(a) If for any month prior to the month in which an individual attains the age of 62—

(1) such individual is entitled to benefits under section 423 of this title, and

(2) such individual is entitled for such month, under a workmen's compensation law or plan of the United States or a State, to periodic benefits for a total or partial disability (whether or not permanent), and the Secretary has, in a prior month, received notice of such entitlement for such month,

the total of his benefits under section 423 of this title for such month and of any benefits under section 402 of this title for such month based on his wages and self-employment income shall be reduced (but not below zero) by the amount by which the sum of—

(3) such total of benefits under sections 423 and 402 of this title for such month, and

(4) such periodic benefits payable (and actually paid) for such month to such individual under the workmen's compensation law or plan,

exceeds the higher of—

(5) 80 percentum of his "average current earnings", or

(6) the total of such individual's disability insurance benefits under section 423 of this title for such month and of any monthly insurance benefits under section 402 of this title for such month based on his wages and self-employment income, prior to reduction under this section.

In no case shall the reduction in the total of such benefits under sections 423 and 402 of this title for a month (in a continuous period of months) reduce such total below the sum of—

(7) the total of the benefits under sections 423 and 402 of this title, after reduction under this section, with respect to all persons entitled to benefits on the basis of such individual's wages and self-employment income for such month which were determined for such individual and such persons for the first month for which reduction under this section was made (or which would have been so determined if all of them had been so entitled in such first month), and

(8) any increase in such benefits with respect to such individual and such persons, before reduction under this section, which is made effective for months after the first month for which reduction under this section is made.

For purposes of clause (5), an individual's average current earnings means the larger of (A) the average monthly wage used for purposes of computing his benefits under section 423 of this title, or (B) one-sixtieth of the total of his wages and self-employment income (computed without regard to the limitations specified in sections 409(a) and 411(b) (1) of this title) for the five consecutive calendar years after 1950 for which such wages and self employment income were highest. In any case where an individual's wages and self-employment income reported to the Secretary for a calendar year reach the limitations specified in sections 409(a) and 411(b) (1) of this title, the Secretary under regulations shall estimate the total of such wages and self-employment income for purposes of clause (B) of the preceding sentence on the basis of such information as may be available to him indicating the extent (if any) by which such wages and self-employment income exceed such limitations.

(b) If any periodic benefit under a workmen's compensation law or plan is payable on other than a monthly basis (excluding a benefit payable as a lump sum except to the extent that it is a commutation of, or a substitute for, periodic payments), the reduction under this section shall be made at such time or times and in such amounts as the Secretary finds will approximate as nearly as practicable the reduction prescribed by subsection (a) of this section.

(c) Reduction of benefits under this section shall be made after any reduction under subsection (a) of section 403 of this title, but before deductions under such section and under section 422(b) of this title.

(d) The reduction of benefits required by this section shall not be made if the workmen's compensation law or

plan under which a periodic benefit is payable provides for the reduction thereof when anyone is entitled to benefits under this subchapter on the basis of the wages and self-employment income of an individual entitled to benefits under section 423 of this title.

(e) If it appears to the Secretary that an individual may be eligible for periodic benefits under a workmen's compensation law or plan which would give rise to reduction under this section, he may require, as a condition of certification for payment of any benefits under section 423 of this title to any individual for any month and of any benefits under section 402 of this title for such month based on such individual's wages and self-employment income, that such individual certify (i) whether he has filed or intends to file any claim for such periodic benefits, and (ii) if he has so filed, whether there has been a decision on such claim. The Secretary may, in the absence of evidence to the contrary, rely upon such a certification by such individual that he has not filed and does not intend to file such a claim, or that he has so filed and no final decision thereon has been made, in certifying benefits for payment pursuant to section 405(i) of this title.

(f) (1) In the second calendar year after the year in which reduction under this section in the total of an individual's benefits under section 423 of this title and any benefits under section 402 of this title based on his wages and self-employment income was first required (in a continuous period of months), and in each third year thereafter, the Secretary shall redetermine the amount of such benefits which are still subject to reduction under this section; but such redetermination shall not result in any decrease in the total amount of benefits payable under this subchapter on the basis of such individual's wages and

self-employment income. Such redetermined benefit shall be determined as of, and shall become effective with, the January following the year in which such redetermination was made.

(2) In making the redetermination required by paragraph (1) of this subsection, the individual's average current earnings (as defined in subsection (a) of this section) shall be deemed to be the product of his average current earnings as initially determined under subsection (a) of this section and the ratio of (i) the average of the taxable wages of all persons for whom taxable wages were reported to the Secretary for the first calendar quarter of the calendar year in which such redetermination is made, to (ii) the average of the taxable wages of such persons reported to the Secretary for the first calendar quarter of the taxable year in which the reduction was first computed (but not counting any reduction made in benefits for a previous period of disability). Any amount determined under the preceding sentence which is not a multiple of $1 shall be reduced to the next lower multiple of $1.

(g) Whenever a reduction in the total of benefits for any month based on an individual's wages and self-employment income is made under this section, each benefit, except the disability insurance benefit, shall first be proportionately decreased, and any excess of such reduction over the sum of all such benefits other than the disability insurance benefit shall then be applied to such disability insurance benefit.